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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Deployment of Wireline Services Offering	)	CC Docket No.98-147
Advanced Telecommunications Capability	)	

COMMENTS OF
e.spire COMMUNICATIONS, INC.

e.spire COMMUNICATIONS, INC.

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SUMMARY

e.spire firmly supports the Section 706 goal of ensuring the deployment of advanced telecommunications capability to all Americans and applauds the Commission for steps it already has taken in this regard through the opening of its Section 706 NOI and the issuance of its first Order and NPRM in this docket. e.spire and other CLECs are ready, willing and able to compete in the market for advanced telecommunications services. However, CLEC efforts to roll-out such advanced services have been seriously impeded by the pervasive unwillingness of ILECs to comply fully with Section 251 of the Act and the Commission's rules and policies interpreting that section.

As explained in these comments, e.spire respectfully submits that the purposes of Section 706 can best be achieved by derailing ILEC refusals to provide necessary unbundled network elements UNEs, efficient collocation arrangements, and interconnection for packet switched services – rather than by permitting ILECs to create advanced services affiliates that operate outside the scope of Section 251(c).

Indeed, e.spire submits that the Commission's ILEC advanced services affiliate proposal cannot be squared with Section 251 nor justified by the Commission's interpretation of Section 272. Even if the appropriate statutory foundation existed for the Commission's proposal, its adoption and implementation would retard the development of local competition and the deployment of advanced telecommunications capability. The creation of truly separate ILEC affiliates simply is not feasible. As a result, the Commission's ability to detect discriminatory and anticompetitive behavior by the ILEC and its Section 251(c)-free alter-ego would be quite limited – the possibility that the Commission actually could enforce the tome of new regulation proposed in the NPRM seems even more remote.

Nevertheless, if the Commission decides to press forward with its separate affiliate proposal, the structural separations rules and safeguards proposed need to be supplemented substantially. Importantly, an ILEC advanced services affiliate should be prohibited from sharing *any* resources or customer proprietary information with its parent. The Commission also must bar such an affiliate from using any of the brands or marks of its parent. To protect against discrimination, the Commission should adopt a rule allowing CLECs to adopt either all *or any portion* of interconnection agreements entered into by ILECs and their advanced services affiliates.

Regarding these affiliates, e.spire also submits that structural separations rules should apply regardless of the size of the ILEC and should not sunset. ILEC advanced services affiliates should be required to file access tariffs and should not be eligible to resell ILEC services pursuant to Section 251(c)(4). Additionally, the Commission should adopt an absolute bar on the transfer of *any* asset between an ILEC and such an affiliate, as that clearly would make the affiliate an assign.

Returning to an appropriate course of action, e.spire generally supports the Commission's proposals regarding collocation and loop unbundling. Reformed national collocation rules that incorporate the best practices of the states will promote competition and facilitate the deployment of advanced telecommunications capability. Among the proposals the Commission should incorporate into uniform national rules are the Extended Link, shared cages, cageless collocation and "adjacent" collocation. The Commission also should adopt rules allowing unrestricted cross connects between collocated CLECs and establishing provisioning intervals and liquidated damages provisions for missed intervals. Unreasonable ILEC restrictions on the types of equipment that can be collocated also should be barred.

e.spire firmly supports the Commission's efforts to ensure that CLECs have adequate access to the "last mile." National minimum unbundling requirements based on functional UNE definitions should evolve to reflect the experience gained over the past two years. To eliminate guessing games involved in obtaining access to conditioned loops, ILECs should be required to make available electronically a "loop inventory" which should be updated on no less than a monthly basis. The Commission also should adopt rules making clear that two different service providers can provide service over the same loop and that ILEC voice services still are subject to the resale requirement of Section 251(c)(4), even in cases where the CLEC seeking to resell an ILEC's voice services provides data services over the same loop on an unbundled basis.

The Commission also should adopt a rule establishing four basic loop types and, based thereon, creating a uniform framework for imposing unbundled loop recurring and nonrecurring charges. To expand the reach of competitive advanced telecommunications service offerings, the Commission should require ILECs to unbundle electronically-equipped loops, as well as electronically capable loops. The Extended Link also should be defined as a UNE.

Regarding loops that pass through remote terminals, e.spire agrees with the Commission's tentative conclusions that unbundling conditioned loops is presumed "technically feasible" if the ILEC is capable of providing xDSL-based services over that loop. In short, if an ILEC uses a conditioned loop for its own services, it must be technically feasible to provide unbundled access to that same loop, regardless of whether it passes through a remote concentration device. To enhance competitors' ability to provision advanced services, the Commission also should require ILECs to offer subloop components, including feeder plant, concentration devices, and distribution plant, as UNEs.

e.spire also submits that, to the extent advanced services are offered by ILECs to end users pursuant to federal tariffs, they are "retail" services and are subject to the resale requirements of Section 251(c)(4).

Finally, e.spire believes that it is neither necessary nor appropriate to grant any RBOC interLATA relief at this time. Moreover, e.spire submits that the Commission's authority to grant even "targeted" interLATA relief actually is quite limited, as its ability to *modify* LATA boundaries does not permit it to grant generally applicable changes or pierce all LATA boundaries in even a "small-scale" or limited way.

TABLE OF CONTENTS

Page

Before the
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In the Matter of	)	
	)	
Deployment of Wireline Services Offering	)	CC Docket No. 98-147
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COMMENTS OF
e.spire COMMUNICATIONS, INC.

e.spire Communications, Inc. ("e.spire"), by its attorneys, respectfully submits these comments in response to the Federal Communications Commission's ("FCC" or "Commission") Notice of Proposed Rulemaking ("*706 NPRM*" or "*NPRM*") issued in the above-captioned docket.[1] As set forth below, e.spire opposes the Commission's proposed authorization of incumbent local exchange carrier ("ILEC") advanced services affiliates. The proposal lacks any statutory foundation and actually threatens to hinder the deployment of advanced telecommunications to Americans in rural and high cost areas. However, e.spire strongly supports the Commission's proposals to adopt additional collocation rules and to define additional or redefine existing unbundled network elements ("UNEs"). These steps will spur the deployment of advanced telecommunications capability by facilitating efforts of competitive exchange carriers ("CLECs") to deploy advanced telecommunications capability and achieve the purposes of the Telecommunications Act of 1996 ("1996 Act").[2]

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1 *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, Memorandum Opinion and Order, and Notice of Proposed Rulemaking (rel. Aug. 7, 1998) [hereinafter "*MO&O/NPRM*"]. *See* Public Notice, CC Docket Nos. 98–146, 98–146, DA 98–1624 (rel. Aug. 12, 1998) (extending filing dates for comments and replies on the *NPRM*).

2 Pub.L. 104–104, February 8, 1998, *amending* the Communications Act of 1934 ("Act").

INTRODUCTION

e.spire firmly supports the Section 706 goal of ensuring the deployment of advanced telecommunications capability to all Americans and applauds the Commission for steps it already has taken in this regard through the opening of its Section 706 Notice of Inquiry *("706 NOI")*[3] and the issuance of its first Memorandum Opinion and Order in this docket *("706 Order")*. As e.spire has commented previously, in response to the *706 NOI*, e.spire and other CLECs are ready, willing and able to deploy advanced telecommunications services wherever a market demand for such services exists. However, CLEC efforts to roll-out such advanced services have been seriously impeded by anti-competitive ILEC behavior. As explained below, e.spire respectfully submits that the purposes of Section 706 can best be achieved by derailing ILEC refusals to provide necessary unbundled network elements ("UNEs"), efficient collocation arrangements, and refusals to interconnect packet switched services – rather than by permitting the creation of ILEC nonregulated advanced services affiliates which cannot be "separate" in any true sense of the word. Finally, if the Commission elects to approve the creation of ILEC advanced services affiliates, e.spire believes strongly that much tougher measures than those proposed in the *NPRM* are required to preclude monopolistic abuses by the ILECs.

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3 *In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, CC Docket No. 98–146, Notice of Inquiry (rel. Aug. 7, 1998) [hereinafter "*NOI*"].

I. THE COMMISSION'S STATUTORILY UNFOUNDED ILEC ADVANCED SERVICES AFFILIATE PROPOSAL THREATENS TO RETARD COMPETITION AND THE DEPLOYMENT OF ADVANCED TELECOMMUNICATIONS CAPABILITY (*NPRM*, ¶¶ 85-117)

e.spire appreciates both the Commission's frustration concerning ILEC delays in implementing Section 251(c) and the enthusiasm with which it has embraced its Section 706 task of encouraging the deployment of advanced telecommunications services. However, e.spire submits that the Commission's proposal to permit ILECs to establish advanced services affiliates free from ILEC interconnection, unbundling and resale obligations cannot be squared with the requirements of Sections 251 or 706.

A. Section 272 Does Not Provide an Appropriate Legal Basis on Which the Commission May Release an ILEC Advanced Services Affiliate from ILEC Regulation (*NPRM*, ¶¶ 89-94)

In the *NRPM,* the Commission relies on Section 272, and its own implementation of that section in the *Non-Accounting Safeguards Order*, as a model for crafting a regulatory scheme whereby ILEC advanced services affiliates may be released from ILEC regulation.[4] This reliance is misplaced. Section 272 never was intended to apply to the in-region provision of advanced data services by an ILEC affiliate. Rather, the structural separation requirements of Section 272 and the *Non-Accounting Safeguards Order* are intended to govern the manner in which a Regional Bell Operating Company ("RBOC") affiliate may provide long distance services within the RBOC's local market once the local and long distance markets in its territory

4 *MO&O/NRPM*, ¶¶ 89-94.

have been opened to competition.[5] Thus, Section 272 reflects congressional conclusions about the manner in which a RBOC may enter a mature, competitive long distance market only *after* the RBOC already has complied with Sections 251 and 271.

Accordingly, Section 272 provides little, if any, guidance regarding the appropriate conditions under which an ILEC that has complied with Section 251 may establish an in-region advanced services affiliate which itself would not be required to comply with Section 251(c).

B. The Commission Cannot Release Separate ILEC Affiliates from the Requirements of Section 251
(*NPRM*, ¶¶ 90-91)

The Commission's reliance on Section 251 as a basis for its proposals also is misplaced. The incumbency obligations of Section 251, as the Commission notes, will apply to any advanced services affiliate of the ILEC that qualifies as a "successor or assign" of the ILEC under Section 251(h)(1)(ii), and to those ILEC affiliates that occupy a position in the local market that is "comparable" to that of the ILEC.[6] Further, the FCC generally has concluded that an affiliate is not a "successor or assign" of an ILEC if it is "truly separate" from the ILEC – that is, as the Commission explains, if the affiliate does not obtain any "unfair advantage" from its relationship with the incumbent.[7]

By this simple definitional leap, the Commission has limited which providers will be classified as successors or assigns of an ILEC to *only* those affiliates that obtain an "unfair

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5 *See* 47 U.S.C. § 272; *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, 11 FCC Rcd 21905, 21908 (1996) [hereinafter "*Non-Accounting Safeguards Order*"].

6 *MO&O/NRPM*, ¶¶ 90-91.

7 *Id.* ¶ 83.

advantage" from the ILEC. This approach, then, conveniently releases from the obligations of Section 251 advanced services affiliates that qualify as successors or assigns but receive only a "fair" advantage as a result of their relationship with the ILEC sibling or parent. e.spire respectfully submits that this is not a permissible interpretation of Section 251(h); indeed, the Commission's approach is plainly inconsistent both with that section and with the broader purposes of the 1996 Act.

C. Creation of a Truly Separate ILEC Advanced Services Affiliate is Not Practically Feasible and Would Impede the Continuing Development of the Telecommunications Network
(*NPRM*, ¶¶ 85-117)

Even if the Commission had the legal authority to authorize the creation of a separate ILEC advanced services affiliate not subject to Section 251, it simply is not possible to create truly separate ILEC affiliates that provide only advanced data services. Analog circuit-switched technology is fast giving way on all fronts to digital, packet-switched technology, which is resulting in the convergence of voice and data networks. It is now clear that the same digital network facilities that are used to provide advanced data services also may be used to provide a full range of voice telephony. Separate voice and data networks do not exist: data can travel over voice circuits, and voice can travel in cells or packets. Similarly, many specific pieces of equipment cannot be classified on the basis of whether they are used exclusively for the transmission of voice or data.

Accordingly, the Commission must be prepared to recognize that any so-called separate ILEC "data" affiliate established, as proposed in the *NRPM,* would be positioned to provide any retail telecommunications service – local, wireless, long distance, as well as advanced data services – on a largely deregulated basis. The only possible way to ensure that the data affiliates provide *only* data services would be for the FCC and state regulators to monitor the operations of the data affiliates, constantly and exhaustively. e.spire observes that, in this context, similar efforts by regulators in the past to monitor and control the activities of ILECs and their affiliates largely have been unsuccessful. The Commission should not endeavor to establish such a regulatory-intensive advanced services scheme, which would be diametrically inconsistent with the mandates of the 1996 Act on multiple levels.

Finally, even if it reasonably were possible to maintain a true separation of voice and data services, the establishment of unregulated data networks – specifically, those not subject to the requirements of Section 251(c) – would distort the incentives for ILEC investment in advanced services network infrastructure. e.spire notes that so-called "separate" ILEC affiliates will have the same ultimate corporate parents, which inevitably will make determinations regarding where to deploy new equipment and new facilities. Faced with the choice, ILEC holding companies would undoubtedly allocate advanced facilities and equipment to an unregulated data subsidiary rather than to the regulated ILEC subsidiary, thereby avoiding the necessity of subjecting the advanced facilities and equipment to the interconnection, unbundling, and resale requirements of Section 251. This desire to shield these network investments from competitors would necessarily redound to the detriment of the existing public switched network and to rapid and widespread technological development of an advanced services network.

II. IF THE COMMISSION CANNOT BE DISSUADED FROM ADOPTING ITS ILEC ADVANCED SERVICES AFFILIATE PROPOSAL, RIGOROUS SEPARATION REQUIREMENTS AND SAFEGUARDS MUST BE ADOPTED AND ENFORCED (*NPRM*, ¶¶ 86, 92–117)

As discussed above, the establishment of separate ILEC advanced services affiliates to provide only data services is neither contemplated nor allowed for by the 1996 Act, and, moreover, is not practically feasible. However, in the event that the Commission decides to implement the proposals in the *NRPM*, it must ensure to the greatest extent possible that the advanced services affiliate is in fact "truly separate." Indeed, the Commission must take every step to ensure that these ILEC advanced services affiliates do not receive any advantages by virtue of their ILEC affiliations. Moreover, the Commission must adopt and enforce an absolute bar on discrimination by an ILEC in favor of such an affiliate. Only then will an ILEC advanced services affiliate be subject to the same competitive conditions facing CLECs.

In the *NRPM,* the Commission generally suggests that an ILEC data affiliate that "satisfies adequate structural separation requirements" and "acquires, on its own, facilities used to provide advanced services," does not qualify as an ILEC and need not be subject to the obligations of Section 251(c).[8] The Commission further states that compliance with seven "structural separation and nondiscrimination requirements," as set forth in the *NRPM*, will suffice to relieve an affiliate from ILEC status.[9] e.spire respectfully suggests that in order to ensure that an ILEC advanced services affiliate is "truly separate," and so be released from the

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8 *Id.* ¶ 92.

9 *Id.* ¶ 96.

obligations of Section 251, the Commission must establish separation and nondiscrimination requirements that are far more than merely "adequate."

The seven basic requirements set forth in the *NRPM* reflect the safeguards established by Section 272 for an RBOC's interLATA affiliate to provide in-region services. As discussed above, those provisions contemplate the operation of an ILEC affiliate in an environment where Section 251(c) has been fully implemented and the local market is open to competition. Because, as the Commission acknowledges in the *NRPM*, the "competitive" situation in the local markets is not, in fact, actually competitive,[10] the Section 272 model is insufficient to ensure the establishment and maintenance of truly independent advanced services affiliates. Thus, additional, more rigorous safeguards than those proposed in the *NRPM*, created to reflect the current state of competition in the local markets, are necessary to accomplish the Commission's stated goals of establishing ILEC advanced services affiliates that function as competitive carriers.

A. The Commission's Seven Structural Safeguards Must Be Strengthened and Modified in Order to Prevent Discriminatory and Anticompetitive Activity and to Make the Affiliate Function as a CLEC
(*NPRM*, ¶¶ 96-97)

1. Affiliates Must "Operate Independently" from Their ILEC Parents

First, the Commission has proposed that, to escape ILEC regulation, an ILEC advanced services affiliate must "operate independently" from the ILEC.[11] The Commission goes on to

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10 *Id.* ¶ 77.

11 *Id.*

specify that an independent affiliate may not jointly own with the ILEC any switching facilities or the land and buildings on which such facilities are located, and, further, that the ILEC "may not perform operating, installation, or maintenance functions for the affiliate."[12] e.spire agrees that these conditions are necessary in order for an ILEC advanced services affiliate to operate with any independence form the ILEC.

However, e.spire believes that additional requirements are necessary in order to ensure true operational independence. Specifically, in addition to restrictions on ownership of facilities, land, and buildings associated with switching equipment, the Commission should prohibit joint ownership of any telecommunications facilities or equipment, and of any interest in real property or physical space. e.spire sees no reason to distinguish switching capabilities or equipment from all other items; regardless of the nature of the ILEC asset involved, the advanced services affiliate would gain an advantage as a result of its relationship with the ILEC that is not available to competitors. Further, all administrative functions – such as payroll, procurement, personnel, legal, and the like – also must remain independent.

In addition, and perhaps most importantly, to avoid any consumer confusion between the ILEC and its affiliate, the Commission must prohibit the affiliate from engaging in joint marketing and advertising with the ILEC, and from using in any way the ILEC's brand name. Familiar ILEC brands and logos, and the power of an ILEC marketing campaign, are vestiges of monopolistic incumbency that would bestow a discriminatory competitive advantage on the ILEC subsidiary vis-à-vis its CLEC competitors, which by virtue of their position can *never* have access to such a valuable asset. e.spire also notes that merely requiring the affiliate to make a

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12 *Id.*

royalty payment to the ILEC for use of its brand will not solve this problem; any such payment would constitute no more than an internal transfer payment. Rather, the Commission should impose on the ILEC affiliate the same standard for misuse of an ILEC brand that would be imposed on a CLEC. That is, in any case where use by an unaffiliated entity of an ILEC brand would constitute trademark infringement, such use by an affiliate likewise should be prohibited.

2. Transactions Between ILECs and Advanced Services Affiliates Must Be at Arm's Length

e.spire agrees with the Commission's suggestion that all transactions between ILECs and their data affiliates should be on an arm's length basis, reduced to writing, and made available for public inspection. The affiliates should also be required to provide on the Internet a detailed written description of any asset or service transferred, as well as the terms and conditions of the transactions.[13] Ready access to these written agreements should help CLECs to ensure that, at least based on the language of the agreements, they receive treatment equivalent to that provided the data affiliates.[14]

Further, e.spire agrees that the Commission should require that all transactions between ILEC and its affiliate comply with the Commission's affiliate transaction rules.[15] e.spire hopes, as the Commission indicates, that the affiliate transaction rules would help to discourage, and facilitate detection of, improper cost allocations in order to prevent ILECs from imposing the costs of their unregulated ventures on ratepayers.

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13 *Id.*

14 e.spire emphasizes, however, that, regardless of the access CLECs have to the agreements between ILECs and their affiliates, e.spire does not believe that it truly is possible to ensure that ILECs do not discriminate in favor of their affiliates.

15 *MO&O/NRPM*, ¶ 96.

Finally, e.spire would suggest that it is necessary for the FCC to apply these affiliate transaction rules, as well as the nondiscrimination rule discussed below, not only in the context of transfers from the ILEC to the affiliate, but also from the affiliate to the ILEC. Without such a reciprocal obligation, the ILEC could avoid its own Section 251 obligations by locating essential facilities or equipment with its affiliate rather than with its local exchange operations, and then obtain access to the assets by resale from the affiliate. Allowing the ILEC to evade its Section 251 obligations as a result of such an arrangement not only would defeat the purpose of the proposals in the *NRPM*, but effectively would eviscerate the local competition provisions of the 1996 Act. Just as the affiliate must not benefit unfairly from the ILEC's incumbent status, so too must the ILEC not benefit unfairly from the affiliate's unregulated status.

3. Books and Accounts Must be Separate

As suggested by the Commission in the *NRPM*, the ILEC and its advanced services affiliate should be required to maintain separate books, records, and accounts.[16] Only a standard of completely separate bookkeeping can come close to ensuring that ILEC data affiliates do not have access to the vast resources of the ILEC.

4. ILECs and Advanced Service Affiliates Cannot Share Officers, Directors or Employees

For similar reasons, the ILEC and its affiliate must have separate officers, directors, and employees.[17] e.spire suggests, however, that the Commission go further and require that an advanced services affiliate have a substantial percentage of outside ownership that is different

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16 *Id.*

17 *Id.*

from ownership of the ILEC. Such an ownership requirement is a simple and effective means for the Commission to try to ensure that the ILEC and its affiliate truly are separate, and has several advantages. For example, if the ILEC affiliate has sufficient public ownership to have a fiduciary relationship in addition to that it has to its parent holding company, market pressures could help give the affiliate stronger incentives to earn a reasonable profit. Thus, the affiliate truly would be functioning independently rather than as an appendage of the ILEC.[18]

This approach has the advantage of ensuring some level of independence of the advanced services company from its ILEC affiliate. Correspondingly, this should alleviate some of the need for ongoing policing by federal and state regulatory bodies of ILEC and affiliate relations. Thus, it is a comparatively deregulatory approach that is entirely consistent with the 1996 Act, and requires less supervision and enforcement than other possible restrictions. It should be noted that this ownership restriction should not be considered as too strict or rigorous – as, indeed, should none of the other restrictions or requirements proposed by e.spire – because the creation of an advanced services affiliate is of course entirely voluntary in the first instance.

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18 LCI International Corporation ("LCI") proposed this approach in a petition filed with the Commission earlier this year. *See generally Petition of LCI International Telecom Corp. for Expedited Declaratory Rulings,* CC Docket No. 98-5 (filed Jan. 22, 1998) ("*LCI Petition*"). e.spire refers the Commission to the *LCI Petition* for a more detailed discussion of the proposal.

5. ILECs Cannot Extend Credit or Collateral for Advanced Services Affiliates

e.spire agrees with the Commission's proposal to prohibit the affiliate from obtaining credit under any arrangement that would permit a creditor, upon default, to have recourse to the assets of the ILEC.[19] Again, e.spire would emphasize that in order for the Commission to fulfill its stated intention of ensuring that ILEC advanced services affiliates are positioned in the market as would be a CLEC. Allowing the ILEC affiliate access – or even the promise or possibility of access to – the ILEC's vast assets would allow the affiliate to derive an unfair advantage from its relationship with the ILEC and prevent true independence.

6. ILECs Cannot Discriminate in Providing Goods, Services, Facilities or Information to Advanced Services Affiliates

Although e.spire is not convinced of the feasibility of this principle, in its dealings with its advanced services affiliate the ILEC must be prohibited from discriminating in favor of the affiliate "in the provision of any goods, services, facilities, or information or in the establishment of standards."[20] In addition, as noted above, the Commission should make this nondiscrimination requirement reciprocal. ILEC advanced services affiliates must be prohibited from discriminating in favor of their ILEC siblings or parents in order to ensure that neither they nor the ILECs are able to avoid their statutory obligations.

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19 *MO&O/NRPM*, ¶ 96.

20 *Id.* ¶ 96; 47 U.S.C. § 272(c)(1).

In this context, e.spire urges the Commission to consider the importance of ensuring that ILECs be prohibited from discriminating in the provision of *any* information to its affiliate. To this end, specifically, customer proprietary information ("CPNI") must be included in the term "information" so as to receive the protections of any rules adopted in this proceeding. Section 272(c)(1) clearly prohibits RBOCs from giving their affiliates an information advantage as a result of the BOCs' traditional monopoly status. In the *Non-Accounting Safeguards Order*, the Commission determined that Section 272's nondiscrimination requirement, as it applies to RBOC provision of "information," includes CPNI.[21] e.spire believes that the same conclusion also is mandated in this proceeding.

Earlier this year, however, the Commission reversed its decision in the *Non-Accounting Safeguards* proceeding and effectively eliminated CPNI from the plain language of Section 272, claiming that Section 272 does not impose any obligations with respect to CPNI than those contained in Section 222.[22] In this instance, if the Commission truly wants to ensure that an ILEC advanced services affiliate does not have an unfair advantage because of its relationship with its ILEC parents, it must reverse its February decision so that CPNI is included as

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21 *Non-Accounting Safeguards Order*, ¶ 222.

22 *Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information*, Second Report and Order and Further Notice of Proposed Rulemaking, CC Docket No. 96-115 (rel. Feb. 26, 1998).

information subject to Section 272's nondiscrimination requirement, and extend that reasoning to ILECs and their advanced services affiliates.[23] Allowing an advanced services affiliate to obtain CPNI from its ILEC parent clearly would give it an information advantage that would defeat the FCC's goal of having ILEC advanced services affiliates function just like CLECs.

7. Advanced Services Affiliates Must Interconnect with ILECs on Terms and at Prices Available to CLECs

The Commission's seventh proposed requirement provides that an ILEC advanced services affiliate must interconnect with the ILEC pursuant to tariff or an interconnection agreement. The Commission also has suggested that the ILEC make available to unaffiliated entities all network elements, facilities, interfaces, and systems provided to the advanced services affiliate.[24] e.spire agrees with both of these proposals and believes their adoption is necessary to put competitors on an equal footing with the ILEC advanced services affiliate. Notably, by virtue of their ILEC affiliation, advanced service affiliates will be able to agree to volume commitments that no CLEC is able to meet. To prevent ILECs from using such volume commitments as a means to provide favorable terms and conditions to only their affiliates, e.spire submits that the Commission should not permit ILECs to vary terms and conditions offered to

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[23] The Competitive Telecommunications Association has requested that the Commission reconsider its decision to reverse its decision to exclude CPNI from the protections of Section 272. See Competitive Telecommunications Association Petition for Reconsideration, CC Docket No. 96-115 (filed May 26, 1998) [hereinafter "*CompTel Petition*"]. e.spire supports the *CompTel Petition*, for the reasons stated therein.

[24] *MO&O/NRPM*, ¶ 96.

their affiliates unless comparable volume commitments have been agreed to by no less than five CLECs who have entered into state commission approved interconnection agreements in the relevant state and have met those volume commitments for three consecutive months.

In addition, e.spire suggests that the Commission require that competitive unaffiliated entities be able to adopt either all *or any portion* of the interconnection agreements executed by ILECs and their separate advanced services affiliates. Without this option, ILECs would be able to enter into interconnection agreements with their affiliates that contain one or more so-called poison-pill provisions, which would then make the entire agreement disadvantageous to competitors. Any monetary disadvantage the ILEC affiliate might incur due to poison pill provisions ultimately would be shared among the various entities in the ILEC corporate family. Thus, essential ILEC elements or services would be protected from the nondiscrimination requirement at no effective cost to the ILEC. This would constitute blatant and unreasonable discrimination on behalf of the ILEC affiliate, and defeat the FCC's stated goals in this proceeding.

B. Structural Separation Rules Should Apply Regardless of the Size of the ILEC – These Rules Should Not Sunset
(*NPRM*, ¶¶ 98–99)

The Commission has sought comment on whether the same separation requirements should apply to all advanced services affiliates, regardless of the size of the associated ILECs.[25] The Commission notes that Section 251(f) provides exemptions from Section 251(c) obligations for certain rural and small LECs, which presumably could serve as models for some sort of *de*

[25] *Id.* ¶ 98.

minimis exception in this proceeding.[26] e.spire suggests, however, that the goal of ensuring that *all* advanced services ILEC affiliates are treated exactly as competitive advanced services providers mandates that any separation requirements adopted be applicable to all advanced services providers, regardless of the size or location of the affiliated IEC. For similar reasons, the Commission should not adopt separation requirements for provision of intraLATA advanced services that are less stringent than those imposed by Section 272 on provision of interLATA advanced services.[27]

Further, the Commission should not now adopt a provision allowing these separation requirements to sunset after a certain period of time.[28] Quite simply, the FCC has no way of knowing whether the plan to allow the creation of separate ILEC advanced services affiliates will accomplish the goals articulated in the *NRPM.* As an alternative to a sunset period, the Commission could consider monitoring the status of competition in the advanced services market, and the relationship of the ILECs to their advanced services affiliates, on a regular basis.

C. ILEC Advanced Services Affiliates Should Be Required to File Access Tariffs (*NPRM*, ¶¶ 100, 116)

e.spire strongly disagrees with the Commission's proposal to classify as nondominant ILEC advanced services affiliates to the extent that they provide interstate exchange access their costs. By virtue of its association with the ILEC, the advanced services affiliate possesses market power, and hence tariffing and cost support should be the minimum requirements applicable to its provision of exchange access services. For similar reasons, the states should not

26 *Id.*

27 *See Id.*

28 *See id.* ¶ 99.